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In the Supreme Court of the United States

OCTOBER TERM, 1944

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN,
PETITIONER

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER AND RUDOLPH WAGNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of James E. Markham, Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 29) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 50) is reported in 147 F. 2d 136.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 24, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a federal district court has jurisdiction of an action *in personam* brought by the Alien Property Custodian against an executor and resident heirs to determine the interest he has acquired by virtue of an order vesting the right, title and interest of alien enemy legatees, the will having been admitted to probate in a state court but no adjudication having been made there with respect to devolution of the estate.

STATUTES INVOLVED

The pertinent provisions of Section 24 (1) of the Judicial Code as amended (28 U. S. C. 41 (a)), and of Sections 5, 7 and 17 of the Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31), are set forth in the Appendix, pp. 13–15.

STATEMENT

Alvina Wagner, a resident of California, died on June 6, 1942 (R. 2, 7). Her will, dated December 23, 1941, was admitted to probate on June 26, 1942 (R. 3, 6–7) in the Superior Court of the

City and County of San Francisco. By this will she left her entire estate, comprised of real and personal property, to four heirs-at-law, all residents and nationals of Germany (R. 3, 6, 8, 10). On December 30, 1942, six other heirs-at-law residing in the United States filed in the Superior Court a petition for determination of heirship (R. 7–9), claiming that under the provisions of California Statutes, 1941, Chapter 895,[1] the German legatees were ineligible as beneficiaries and that the American heirs should therefore inherit the decedent's estate. There has never been a hearing on this petition.

On January 23, 1943, the Alien Property Custodian issued Vesting Order No. 762 (R. 10) by which he vested in himself all right, title and interest of the German legatees in the estate of Alvina Wagner. On April 6, 1943, the Custodian commenced an action in the District Court against the executor and the six California claimants (R. 2), seeking a judgment determining that the resident claimants have no interest in the estate,

[1] The statute purports to limit inheritance by nonresident aliens to nationals of countries which grant reciprocal rights to American citizens. There are similar statutes in Arizona, 3 Ariz. Code (1939), Sec. 39-111; Montana, Laws of Mont. (1939), ch. 104, p. 219; Nevada, 2 Nev. Laws (Supp. 1931–1941), Sec. 9894; Oklahoma, 60 Okl. St. Ann. (1936), Sec. 121; Oregon, 5 Oregon Comp. Laws Ann. (1940), Sec. 61–107; Texas, 1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167, and 177. See also 2 Gen. Stats. of Conn. (1930 Rev.), Sec. 5055.

that the Custodian is entitled to distribution and is the owner of certain specified real property, and ordering the executor to pay the entire net estate to the Custodian upon the allowance by the state court of the executor's final account (R. 4–5).

On May 25, 1943, the defendants filed a motion to strike the complaint upon the ground that the court had no jurisdiction over the subject matter of the action (R. 15), and on July 8, 1943, they filed an answer and a cross-claim, which included a motion to dismiss (R. 18). On July 26, 1943, the Custodian filed a motion for judgment on the pleadings (R. 26). On November 17, 1943, the District Court denied the motion to strike the complaint, granted the Custodian's motion for judgment on the pleadings, and ordered entry of a decree granting the relief demanded by the Custodian. Judgment thereon was entered on December 28, 1943. (R. 40.)

The District Court held that it had jurisdiction to enforce the vesting orders of the Alien Property Custodian (R. 34); that its jurisdiction is derived from the Constitution and laws of the United States and is not subject to restriction or ouster by state legislation (R. 33); and that California Statutes, 1941, Chapter 895, is invalid as an attempt by the state to enter the field of foreign relations (R. 37). The District Court held, therefore, that the Alien Property Custodian has acquired the interests of the German nationals in

the estate of the late Alvina Wagner; that none of the defendants has any right, title or interest in the estate; and that the Alien Property Custodian is entitled to receive the net estate in distribution after the payment of expenses of administration, debts and taxes (R. 40).

The defendant heirs appealed[2] to the Circuit Court of Appeals for the Ninth Circuit, which reversed the judgment without passing upon the merits of the Custodian's claim, upon the ground that the District Court was without jurisdiction of the subject matter of the action (R. 50–51). The Circuit Court of Appeals held that since "the matter is within probate jurisdiction and that court [i. e., the state probate court] is in possesison of the property, its right to proceed to determine heirship cannot be interfered with by the federal court" (R. 51).

REASONS FOR GRANTING THE WRIT

1. *The decision of the court below that the District Court lacked jurisdiction under Section 24 (1) of the Judicial Code is contrary to decisions of this Court and of other Circuit Courts of Appeals.*

Section 24 (1) of the Judicial Code confers original jurisdiction upon the district courts of "all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue." On its face,

[2] The defendant executor, The San Francisco Bank, did not appeal.

this proceeding by the Custodian is a "suit of a civil nature * * * in equity" brought by an officer of the United States authorized to sue, and therefore within the scope of Section 24 (1) of the Judicial Code. To hold nevertheless that the suit cannot be maintained in the federal courts it is necessary to conclude, as did the court below, that this is a matter of probate impliedly excluded from the broad jurisdictional grant. This conclusion is inconsistent with many decisions of this Court which clearly establish that proceedings of this kind are not matters of probate within the exclusive jurisdiction of the state courts.

Where "the entire rights of the parties" depend upon "the establishment or non-establishment of the will," the question is "entirely and exclusively within the jurisdiction of the Probate Court." *Case of Broderick's Will,* 21 Wall. 503, 517; see also *Farrell* v. *O'Brien,* 199 U. S. 89. Similarly, where an out of state claimant of an interest in an estate seeks to have the administration *in rem* conducted under the supervision of a federal court, the matter has been held to be one "of strict probate" and therefore "not within the ordinary equity jurisdiction of the federal courts." *Sutton* v. *English,* 246 U. S. 199, 205. But in the present case the will has already been admitted to probate and the petitioner does not seek to have it withdrawn. And, as the District Court recognized, "the State probate procedure itself is to be un-

touched." (R. 37.) The Custodian seeks only a determination of his interest. The relief sought, far from calling for interference with the continuation of administration in the probate court, assumes that the estate will remain in the hands of the executor until the allowance of its final account. (See R. 5.)

In similar situations this Court has uniformly upheld the jurisdiction of federal courts. A comprehensive review of the decisions prior to 1909, set forth in Mr. Justice Day's opinion for the Court in *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, reveals consistent adherence to the principle that federal courts will assume jurisdiction "to determine and award by decrees binding *in personam* * * * shares in * * * estates" (p. 45). In that case an out of state claimant of a share of a Louisiana decedent's estate filed a bill in equity in a federal court to establish her interest. The executor and legatees named in the will, which had been admitted to probate, were defendants. The claimant prayed for a decree that certain legacies and residual bequests were invalid and devolved to her as next of kin; that the executor be ordered to pay over the whole amount of the invalid legacies and bequests; and that an account be taken to show the residue in the hands of the executor. The decision of this Court affirmed federal jurisdiction

to determine the claimant's interest and render a judgment binding "as against the executor, and the interest of the persons before the court," concluding that such relief would not "interfere with the possession of the probate court." (215 U. S. at 50.)

The Custodian has asked here only that the District Court make a determination of his rights *in personam*. All matters of administration—accounting, expenses, taxes, and indeed the ultimate distribution—are to be performed under the supervision of the state court. If, in spite of the petitioner's recognition of continuing state court jurisdiction, the court below construed the complaint (R. 2)as seeking *in rem* relief also, the court could have limited the relief to that clearly allowable. But in denying jurisdiction *in toto,* it has plainly made a determination in conflict with *Waterman* v. *Canal-Louisiana Bank Co.,* and the numerous other decisions before and since which affirm the same established jurisdictional principles. See, *e. g., Commonwealth Co.* v. *Bradford,* 297 U. S. 613, 619, and *Fischer* v. *Amer. United Ins. Co.,* 314 U. S. 549. It is immaterial that in these cases federal jurisdiction rested upon diversity of citizenship rather than, as here, upon the fact that the suit was instituted by an officer of the United States. If the phrase "suits * * * in equity," as used in Section 24 (1) of the Judicial

Code, comprehends in diversity cases the determination of interests in decedents' estates, there is no ground for giving it a different meaning here.

The decision of the court below also conflicts with decisions of other circuit courts of appeals which have followed the rule laid down in the *Waterman* case. *E. g., Miami County National Bank* v. *Bancroft,* 121 F. 2d 921 (C. C. A. 10th); *O'Connor* v. *Slaker,* 22 F. 2d 147 (C. C. A. 8th). Moreover, in *Blacker* v. *Thatcher,* 146 F. 2d 255, certiorari denied February 26, 1945, the Circuit Court of Appeals for the Ninth Circuit has itself recently followed the rule of the *Waterman* case, by recognizing federal jurisdiction, where there is diversity of citizenship, to determine and award shares in an estate admitted to probate in state court.

2. *The court below erred in holding that Section 17 of the Trading with the Enemy Act does not establish jurisdiction of the District Court. Its ruling in this respect is in conflict with the judicial construction of Section 17 in the Second Circuit.*

Section 5 (b) (1) of the Trading with the Enemy Act, as amended, provides that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President." 55 Stat. 839. The Custodian, exer-

cising powers delegated to him by the President (Executive Orders 9095 and 9193), vested the right, title and interest of certain named alien enemies in the estate of the decedent. It is clear that he could himself have determined that a definite part or all of the estate was enemy property and could have vested the property itself instead of vesting only the alien enemies' interests therein. If the Custodian had vested the property itself, it has long been settled by the decisions of this Court that his determination would have been conclusive to establish his paramount right to possession, and that the redress available to other claimants of interests in the estate would have been limited to statutory remedies assertible only in the federal courts. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51.

The Custodian, however, did not issue an order vesting specified property but vested only the unspecified right, title and interest of the named aliens in the estate, leaving the extent of the aliens' share to be determined in a judicial proceeding. Section 17 of the Trading with the Enemy Act confers jurisdiction upon the federal district courts "to make and enter * * * all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act." In seeking

the present determination in the federal courts, the Custodian is, in accordance with Section 17, merely asking for a "decree * * * necessary and proper in the premises to enforce the provisions of this Act." There is nothing in the comprehensive language of Section 17 to suggest its inapplicability to a suit to enforce a vesting order of the Custodian merely because the order relates to property in the administration of a probate court. We believe that the correct interpretation of Section 17 was suggested by Judge Learned Hand in *Kahn* v. *Garvan,* 263 Fed. 909, 912 (S. D. N. Y., 1920):

> * * * The trustee might perhaps file this bill in the New York courts, have his accounts stated, and get binding instructions; but it does not follow that he may not file a bill here as well. Section 17 confers on this court general jurisdiction "to enforce the provisions of" the Trading with the Enemy Act * * *, and if this be a suit ancillary to that purpose the jurisdiction extends so far.

In *Application of Miller,* 288 Fed. 760, the Circuit Court of Appeals for the Second Circuit affirmed an order of the district court requiring an executor under a will admitted to probate in a state court to pay over certain moneys due to German legatees where the Custodian's order had merely called for "every right, title, and interest of said enemy in and to the estate." Here, the

only present relief sought is a judgment *in personam* against the defendant heirs and executor. By denying jurisdiction to grant this limited relief on facts similar to those which in the Second Circuit have been held to support an order for immediate possession under Section 17, the court below has created a conflict in the decisions of the two circuits.

3. *The question presented is of national importance.*

The Custodian has vested the interests of foreign nationals in approximately 2,000 decedents' estates. Whether the federal courts have jurisdiction to vindicate the rights thus acquired by the United States is, therefore, a question of substantial importance in the administration of the Trading with the Enemy Act.

CONCLUSION

It is respectfully submitted that this petition should be granted.

CHARLES FAHY,
Solicitor General.

APRIL, 1945.

APPENDIX

Judicial Code, as amended (28 U. S. C. 41 (1)):

> SECTION 24. The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue * * * or, where the matter in controversy exceeds * * * $3,000, and * * * is between citizens of different States * * *.

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

SEC. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. III, 616):

> (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

SEC. 7 (c) [as amended, 40 Stat. 1020] If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for

the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

SEC. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary".

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